IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3958 OF 2004

Fatehsinh Mohansinh Chauhan ...Petitioner

Versus

Union Territory of Dadra & Haveli,
Silvassa, Dadra & Nagar Haveli
& Anr. ...Respondents

ALONG WITH

CRIMINAL APPLICATION NO.4155 OF 2004

IN

CRIMINAL APPLICATION NO.3958 OF 2004

Damabhai Lasybai Choudhary ...Applicant

Versus

Fatehsinh Mohansinh Chauhan & Ors. ...Respondents

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Mr.Shirish Gupte, Sr.Counsel with Mr.Balkrishna D.Joshi for Applicant in Cri.Appln.3958/04 & for Respondent No.1 in Cri.Appln.4155/04.

Mr.Dipesh Mehta for Respondent No.1 in Cri.Appln.3958/04 & for Responent No.2 in Cri.Appln.4155/04.

Mr.A.S.Gadkari, A.P.P. for Respondent No.2 in Cri.Appln.3958/04 & for Respondent No.3 in Cri.Appln.4155/04.

Mr.S.V.Marwadi for First Informant in Cri.Appln. 3958/04 & for Applicant in Cri.Appln.4155/04.

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CORAM: A.M.KHANWILKAR, J.

OCTOBER 8, 2004.

P.C.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Mehta waives notice for Union Territory of Dadra & Haveli, Silvassa, Dadra & Nagar Haveli. Mr.Gadkari, A.P.P. waives notice for State of Maharashtra.

3. As short question is involved, the matter is heard for final disposal forthwith, by consent.

4. In addition to the Counsel for the Respondents, I have also heard Mr.Marwadi, who claims to be appearing for the first informant.

5. Briefly stated, the Applicant who is accused No.7 in Sessions Case No.29 of 1996 pending before the Sessions Judge, Dadra and Nagar Haveli at Silvassa is being tried for offence punishable

under Section 302, 147, 148, 149 of the Indian Penal Code. Suffice it to observe that the trial of the case has progressed till the recording of statement of the accused under Section 313 of the Code, in particular, of the Applicant herein and the Applicant, in turn, has examined two witnesses as defence witnesses. It is only thereafter, the Public Prosecutor moved an application on 19th July 2004 praying that summons be issued to one Shri S.P.Marwah, the then Collector of Dadra and Nagar Haveli, presently holding post of Director, Jal Nigam Board, New Delhi and to examine him under Section 311 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code'). This Application was resisted by the Applicant, inter alia, on the ground that it is an attempt to fill in the lacuna in the prosecution case. This submission proceeded on the premiss that as soon as the First Information Report was lodged in the concerned Police Station, the Applicant had moved application for anticipatory bail as back as in the year 1996, wherein, he had disclosed his stand of alibi. In Paragraph 4 of the Anticipatory Bail Application, it was stated as under :

> "In fact, the accused had not visited Khanvel or even Khadoli village in the evening time as he had meeting in the circuit house alongwith the Hon'ble Administrator, A.I.G.P., Collector and others from 6-00 pm and prior to that from 5 pm to 5.30 pm he was with RDC and Collector. So at the time of alleged incident the accused was very well in Silvassa only."

6. The Applicant further asserted that even while opposing the application preferred for police custody of the Applicant, the Applicant re-iterated his stand in his reply before the lower Court, as can be discerned from Paragraphs 4 and 5 of the said reply. Further details have been mentioned in the said reply indicating the names of persons with whom the Applicant was present at the relevant time, which clearly ruled out the possibility of Applicant being present at the scene of offence, which is the prosecution case. On the basis of the stand taken by the Applicant, even the lower Court in its order dated 6th May 1996 had occasion to observe that inspite of specific stand taken on behalf of the Applicant, no explanation or rebuttal is forthcoming from the prosecution on the point of alibi.

7. Be that as it may, the Applicant had also placed reliance on the correspondence exchanged between the Investigating Officer and the Public Prosecutor, wherein the concerned Police Inspector in his letter dated 14th May 1996 addressed to the Special Public Prosecutor, sought advise as to whether he should record the statements of the higher ranking officers in order to "kill the said alibi". Even the Public Prosecutor in his letter dated 9th August 1996, addressed to the Collector, Silvassa, in connection with application for cancellation of bail, enquired with the investigating agency as to what steps have been taken to rule out the plea of alibi. Besides these documents, the Applicant strenuously placed reliance on the fact that the Applicant cross-examined the concerned prosecution witnesses in the context of his defence of alibi and has taken that plea in his statement recorded under Section 313 of the Code and further examined two witnesses to make good his defence. It is, however, only thereafter, the prosecution thought it appropriate to move the Court by way of subject

application, praying that summons be issued to Mr.S.P.Marwah, the then Collector, to examine him by exercising powers under Section 311 of the Code, which application was obviously mischievous and in any case, an attempt to fill in the lacuna in the prosecution case.

8. Mr.Gupte appearing for the Applicant has placed reliance on the decision of the Apex Court in the case of **Rajendra Prasad vs. Narcotic Cell reported in (1999) 6 SCC 110** to contend that there is marked distinction between filling the lacuna in the prosecution case and the lacuna committed by the Public Prosecutor during the trial, due to oversight and inadvertence. It is then contended that in the latter case, the powers under Section 311 of the Code can be invoked to cure the defect during the trial but in the former case, it is not open to the Court to allow the prosecution to fill the lacuna in the prosecution case.

9. Reliance is also placed on the decision of our High Court between the parties herein, which is reported in **2003 Bom.C.R. (Cri.) 1103,** which had

occasion to examine similar contention. In Paragraphs 18 and 19 of this decision, relying on the exposition of the Apex Court in **Rajendra Prasad's case (Supra)**, this Court has taken the view that lacuna in the prosecution case has a meaning of inherent weakness in the prosecution case. The prosecution case is one which is submitted along with the charge-sheet. If such lacuna is left at the level of filing of charge-sheet, that means if there is any lacuna in the investigation, that lacuna cannot be overcome by the prosecution during the course of trial or by taking recourse to the provisions of Section 311 of the Code.

10. On the other hand, Counsel for the Respondents as well as the first informant submit that no fault can be found with the view taken by the Court below for the reasons recorded in the impugned decision. According to them, the Court below has found that to ensure that justice is done and as the defence has kept back the defence of best available evidence, it was necessary to accede to request of the Public Prosecutor to summon said

Mr.Marwah, the then Collector, for being examined by exercising powers under Section 311 of the Code. It is submitted that if the Court below has exercised discretion which was permissible by the provisions of Section 311 of the Code, this Court should be loath in interfering in exercise of inherent jurisdiction. Reliance is placed on the decision of the Apex Court in **P.Chhaganlal Daga vs. M.Sanjay Shaw reported in 2004 SCC (Cri.) 183**, to contend that the Court has ample power in exercise of Section 311 of the Code to summon witness for arriving at a just decision even if the evidence on both sides is closed. Reliance is also placed on the decision reported in **AIR 1968 SC 178 in the case of Jamatraj Kewalji Govani vs. State of Maharashtra**, which takes the view that it is always open to the Court to summon witness in exercise of powers under Section 311 of the Code, if the situation so warrants.

11. Mr.Marwadi appearing for the First Informant submits that the witness, who was to be summoned, was not to be examined as prosecution witness but as Court witness. However, this stand

is not supported by the Public Prosecutor, who is appearing for the Respondent No.1 in the present case. According to him, the witness was to be summoned as prosecution witness. Learned Public Prosecutor further adds that examination of this witness was necessary because the Applicant concedes that he was present along with Mr.Marwah at the relevant time and therefore, his evidence would be the best evidence to arrive at a just decision.

12. Now, at this stage, the Public Prosecutor intervenes and submits that his earlier stand that the witness was to be examined as prosecution witness, may not be recorded but instead, according to him, the said witness will have to be examined as Court witness.

13. Having considered the rival submissions, I will first deal with the controversy as to whether Mr.Marwah is to be examined as prosecution witness or as Court witness. The Application as filed before the Trial Court on behalf of the Respondent No.1 by the Public Prosecutor, does not even

remotely suggest that the witness be summoned as Court witness. On the other hand, on fair reading of the said Application, it is more than clear that the prosecution wanted to examine the said Mr.S.P.Marwah, the then Collector as its witness. Besides, even the impugned order does not support the stand of the Respondents that the Court exercised powers under Section 311 of the Code so as to examine Mr.Marwah as the Court witness but simply allowed the application as filed by the prosecution.

14. Be that as it may, the question is: whether it was permissible for the Court to issue summons to Mr.Marwah, at this stage of the proceedings, in exercise of powers under Section 311 of the Code. Indeed, in view of the expansive provision contained in Section 311 of the Code, there is ample power with the Court to issue summons to any witness at any stage of the trial. However, the Trial Court has to exercise that power with circumspection. In the present case, the grievance on behalf of the Applicant is not that the Court has no power under Section 311 of the

Code to issue summons to any witness at any stage of the trial, but the grievance which was specifically made before the Court below and has been reiterated before this Court, is that, the plea of alibi was taken by the Applicant as back as in the year 1996, when application for anticipatory bail was filed on behalf of the Applicant. Even thereafter, that stand has been re-iterated and better particulars were provided in the reply filed by the Applicant while opposing the application for police custody moved on behalf of the prosecution. Even the lower Court in its order dated 6th May 1996, had occasion to observe that inspite of such a stand taken, the investigating agency has not considered it appropriate to rebut or place relevant materials on record. Besides, the correspondence exchanged between the Police Inspector, who was the Investigating Officer and the Special Public Prosecutor, also reveal that concern was expressed regarding the stand taken by the Applicant. Inspite of the stand so taken by the Applicant, no attempt was made by the investigating agency to collate relevant material in that behalf before the charge-sheet was laid.

Even while the prosecution evidence was laid before the Trial Court, no attempt was made in that behalf. On the other hand, the Applicant has cross-examined the prosecution witness in the context of his stand of alibi. Besides, the Applicant has deposed in his statement under Section 313 as well as examined two defence witnesses to support his stand. It is in this backdrop, it is argued that if the said application was to be granted, that would inevitably result in permitting the prosecution to fill up the lacuna in the prosecution case. The trial Court, though adverted to these submissions, but to my mind, has not addressed itself to the same appropriately; whereas by recording general observations, proceeded to invoke powers under Section 311 of the Code on the ground that to ensure justice is done, it was necessary to issue summons to Mr.Marwah for just decision of the case. There is another reason which can be discerned from the decision of the lower Court, which is impugned in this Petition. It is observed that defence has kept back the best available evidence of the then Collector who had convened the meeting according to the

Applicant/accused No.7, in which, he was stated to be present.

15. Insofar as the first reason recorded by the Court below, the same clearly overlooks the marked distinction between filling the lacuna in the prosecution case and curing the defect on account of the failure of the Public Prosecutor during the trial, as has been noted by the Apex Court in the decision of the **Rajendra Prasad (Supra).** In Para 7 of the said decision, the Apex Court has observed thus :

> "A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses .....".

. In Para 8 of the same decision, the Apex Court has observed as follows:

> "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the

> prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna .....".

16. This aspect has been considered in the decision of our High Court reported in **2003 Bom.C.R. (Cri.) 1103 in the case of Fatehsinh Mohansinh Chauhan & Ors. vs. Union Territory of Dadra & Nagar Haveli, Silvassa & Anr. (Supra)**, as can be discerned from dictum in Paragraphs 18 and 19 of the said Judgment.

17. Viewed in this perspective, as the prosecution now insists for examining Mr.Marwah as witness, that is only an attempt to fill in the lacuna in the prosecution case. If it is so, it was not open to the Court below to accede to the request of issuing summons to such witness, as has been done by the impugned order. Assuming that the second reason recorded by the Trial Court must have weighed with it for issuing summons to Mr.Marwah, namely, the defence had kept behind the best

available evidence of the then Collector who had convened the meeting in which the Applicant was stated to be present, the defence has already examined two witnesses, which according to it are sufficient to support his (Applicant's) case. If the Trial Court is of the opinion that, that evidence is insufficient, the logical conclusion could be drawn for accepting or not accepting the defence version. However, merely because the defence has not examined one more witness, who could also have been examined by the defence, that by itself, may not be sufficient reason for invoking powers under Section 311 of the Code. As mentioned earlier, whether the evidence laid by the defence, is adequate to support his stand, is a matter of appreciation of evidence and if the Trial Court is not satisfied with the said evidence, the matter can be appropriately decided on the said finding. But I see no reason as to why the Trial Court should exercise its power under Section 311 of the Code in the fact situation of the present case, at the instance of the prosecution. Reliance is rightly placed on the decision of the Andhra Pradesh Judgment reported in **1983 Cri.L.J. (NOC)**

140 in the case of Surepalli Venkateswara Rao vs. State D.S.I. of Police IV Town P.S.Vijayawada, which has taken the view that Court should decline to exercise the powers under Section 311 of the Code to examine a witness when the prosecution seeks to examine him because it could not examine him, though it had intended to do so.

18. Hence, this application succeeds. The impugned order is set-aside.

19. In view of the above, all accompanying Criminal Applications are disposed of.

20. Counsel for the Respondent No.1 prays that the operation of this order be stayed. This request being reasonable, this order may not be given effect to for a period of four weeks from today.

21. Issuance of certified copy is expedited.

A.M.KHANWILKAR, J.